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NO. 75-642

IN THE

# Supreme Court of the United States

October Term, 1975

CORNELIUS J. KEHOE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR REHEARING

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR REHEARING

Petitioner, Cornelius J. Kehoe, respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on February 23, 1976, and (2) granting the petition. As grounds for this motion petitioner presents the following:

**1. The decision below conflicts with *Fong Foo v. United States*, 369 U.S. 141 (1962) and *Green v. United States*, 355 U.S. 184 (1957) which hold that an acquittal after jeopardy has attached, no matter how egregiously erroneous, invokes the Double Jeopardy Clause and denies to the government either an appeal under 18 U.S.C. § 3731 or another trial on a reindictment for the identical criminal misconduct.**

The double jeopardy trilogy of *United States v. Wilson*, 420 U.S. (1975); *United States v. Jenkins*, 420 U.S. 358 (1975); and *Serfass v. United States*, 420 U.S. 377 (1975) reiterate and emphasize the holdings in *Fong Foo* and *Green*. And the latter cases hold that where, as in Petitioner Kehoe's case, further proceedings of factual issues going to the elements of the offense charged, would have been required upon reversal and remand of the judgment of acquittal (had there been an appeal by the Government), the Double Jeopardy Clause prohibits appeal by the government pursuant to 18 U.S.C. 3731 and thus prohibits another trial on the government's reindictment of Kehoe for the identical criminal conduct. The Kehoe case does not involve one of those procedural situations where the district court loosely used the word "Acquittal" to mean "Dismissal" or "Mistrial". To the contrary the district court was fully aware of the thrust of Rule 29 as well as the significance of Rule 12(b)(2) of the Federal Rules of Criminal procedure, and these were carefully considered by the court before making its determination to enter a judgment of acquittal pursuant to Rule 29(a) (App. C to Petitioner Kehoe's Petition for Writ of Certiorari, A. 28). The district court entered the judgment of acquittal because the government had not met its burden of proof in demonstrating that the

indictment of Kehoe recited an offense for which prosecution could be brought (App. C to Petitioner Kehoe's Petition for Writ of Certiorari, A. 28).

Petitioner Kehoe's case, therefore, does not involve a mistrial and thus the Court of Appeals majority below erroneously applied the interest-balancing approach of *Illinois v. Sommerville,* 410 U.S. 458 (1973), which is only applicable to mistrial situations. The mistrial interest-balancing test of *Sommerville,* has no application to dismissals or acquittals that occur during trial after jeopardy has attached.

The clear conflict between the majority decision below and *Fong Foo* and *Green* justifies the grant of certiorari to review the majority decision of the court of appeals.

**2. The majority decision below conflicts with *United States v. Robbins,* 510 F.2d 301 (6th Cir. 1975), *Cert. denied,* January 12, 1976, No. 75-67, and *United States v. Fayer,* 523 F.2d 661 (2nd Cir. 1975), which hold that, after jeopardy has attached, termination of a case in favor of the defendant as a matter of law during the course of the trial invokes the double jeopardy clause and denies to the government either an appeal under 18 U.S.C. § 3731 or another trial on a reindictment for the identical criminal misconduct.**

The *Robbins* case presents a fact situation extremely close to that of the decision below. In *Robbins* the defendant was indicted for extortion in attempting to collect a gambling debt. A jury was empaneled and after the government had rested, the defendant made a motion for a judgment of acquittal. The trial court entered a judgment of acquittal holding as a matter of law that the statute involved (18 U.S.C. §894) did not apply to the collection of illegal gambling debts. The Sixth Circuit

Court of Appeals held that the Double Jeopardy Clause precluded an appeal by the government under 18 U.S.C. 3731.

In *Fayer,* during the course of a bench trial, and before a full resolution of the facts, the trial court entered a judgment of acquittal as a matter of law. The Second Circuit Court of Appeals denied the government's attempt to appeal, on double jeopardy grounds. The Court of Appeals in *Fayer* quoted *United States v. Jenkins,* 420 U.S. 358, at 367, in support of its conclusion that the Double Jeopardy Clause precluded an appeal because " 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.' "

The first question reserved in *Serfass v. United States,* 420 U.S. 377, at 394, asks whether a district court's dismissal of an indictment on legal grounds, after jeopardy has attached, is appealable under 18 U.S.C. §3731.

This question has now been answered at least three times (including *United States v. Means,* 513 F.2d 1329 (8th Cir. 1975)) by the Second Circuit, The Sixth Circuit and the Eighth Circuit contrary to the decision of the majority opinion below and in agreement with the dissenting opinion below. Grant of Certiorari to review the majority decision of the court of appeals is not only justified by the need for resolution of the conflicts presented, but it is equally justified because resolution of the first question reserved in *Serfass* is of great importance to the system of criminal justice. Because the Double Jeopardy Clause also applies to the States, both federal and state courts need to know the extent of the protection it affords.

**3. The majority decision below presumes petitioner Kehoe's intentional relinquishment or abandonment of his Fifth Amendment protection against double jeopardy by reason of his trial attorney's decision to take advantage of what is expressly permitted by Rule 12(b)(2). Federal Rules of Criminal Procedure. Said decision conflicts with holdings of this Court and, furthermore, amounts to the resolution of an important due process of law question, which has not been, but should be, decided by this Court.**

When petitioner Kehoe's trial attorney elected to wait until the government rested before making his motion for acquittal "because he wanted an opportunity to view the "government's evidence" (App. A, Petitioner Kehoe's Petition for Writ of Certiorari, A. 13-A. 14), he was merely taking advantage of what is expressly permitted by Rule 12(b)(2). The majority decision below imposed an after-the-fact penalty on the exercise of this Rule (b)(2) right by presuming Petitioner Kehoe's waiver of his Fifth Amendment protection against double jeopardy. Said decision conflicts with *Ohio Bell Tel. Co. v. Public Utilities Commission,* 301 U.S. 292, 307 (1937), which holds that courts "do not presume acquiescence in the loss of fundamental rights," and it conflicts with *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393 (1937) which holds that courts should "indulge every reasonable presumption against waiver."

Further, the after-the-fact presumption of petitioner Kehoe's consent to waiver of a fundamental constitutional right as a penalty for his trial attorney's exercise of a procedural right expressly granted by this Court (in Rule 12(b)(2) and adopted by Congress (pursuant to 18 U.S.C. § 3771) raises a serious due process question which should be settled by this Court.

Finally, the majority decision of the Court of Appeals in imposing such an after-the-fact penalty on petitioner, has so far departed from the accepted and usual course of judicial proceedings as to call for correction by this Court in the exercise of its supervisory power over the federal courts.

## CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, Petitioner Kehoe prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

As one of the counsel for Petitioner Kehoe, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

JAMES J. HIPPARD, SR.
*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of March, 1976, three copies of this petition for rehearing were air mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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